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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1006

CONTINENTAL OIL COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Continental Oil Company respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved

This proceeding involves a claim for refund filed by the petitioner's predecessor, Elk Basin Consolidated Petroleum Company (hereinafter sometimes referred to as "Elk Basin"), to recover an overpayment of income and excess profits taxes made by it for the calandar year 1920. The Court of Claims, in the action brought to enforce the claim, gave judgment for the petitioner in the sum of $12,156.99 only, instead of the sum of $58,419.90 demanded by the peti-

tioner, and furthermore, limited interest on the judgment in violation of Section 177(b), Judicial Code.

Briefly stated, the material facts are as follows:

On January 1, 1920, Elk Basin acquired all the outstanding capital stock of Grass Creek Petroleum Company and of Keoughan Hurst Drilling Company in exchange for 133,333⅓ shares and 466,662⅔ shares, respectively, of its own capital stock issued on that day. Said companies are herein sometimes referred to as "Grass Creek" and "Keoughan Hurst" respectively. Similarly, on March 15, 1920, Elk Basin acquired all the outstanding capital stock of the Mutual Oil Company of Maine, Mutual Oil Company of Arizona, Mutual Refining & Producing Company, and Northwestern Oil Refining Company (hereinafter referred to as "the Mutual Group"), in return for 600,000 shares of its own capital stock which it issued on that day. Throughout the calendar year 1920 Elk Basin and the companies of the Mutual Group continued in existence and conducted their respective businesses.

On March 15, 1921, Elk Basin filed its consolidated income and excess profits tax return for the calendar year 1920, which return included the income of Elk Basin, Grass Creek, Keoughan Hurst and of the Mutual Group and set up the invested capital of the consolidation. The total tax shown to be due on that return was the sum of $200,707.44, which Elk Basin duly paid.

The Commissioner of Internal Revenue, after auditing that consolidated return, determined that the Mutual Group of companies were affiliated with Elk Basin, for federal tax purposes, only from March 15, 1920 to the end of that year; and that for the period January 1, 1920 to March 14, 1920 the Mutual Group constituted by themselves a separate affiliation for tax purposes and that they should have filed their own consolidated tax return based upon the income

and invested capital of that separate affiliation during that two and a half month period. It therefore became necessary to determine what portion of the total income reported by Elk Basin in the return filed by it in March, 1921, was allocable to each of the two taxable affiliations which the Commissioner of Internal Revenue found to be in existence in the year 1920. Such an allocation was finally made, and thereafter a deficiency in taxes for the Mutual Group affiliation was determined by the Commissioner in 1925 and was by him asserted against Elk Basin as transferee of the Mutual Group, whose assets it had by then acquired. Elk Basin was then known as Continental Oil Company of Maine. After extensive litigation the deficiency assessment became final, and in 1944 was duly paid by the plaintiff, Continental Oil Company of Delaware, which corporation had become the successor of the Continental Oil Company (of Maine) in a reorganization of the two companies effected in 1929.

The consequence of the Commissioner's determination was that Elk Basin had overpaid its taxes, for its return filed for 1920 included the income of the Mutual Group for the first two and a half months of that year. Accordingly, the Commissioner of Internal Revenue after examining the claim filed by the Maine corporation in 1925, determined that there had been an overpayment of taxes by Elk Basin in the sum of $12,779.97 and duly issued a certificate of overassessment therefor, together with a check in that amount, plus accrued interest. That check was returned (and subsequently cancelled and the money repaid into the Treasury of the United States) for the reason that in computing Elk Basin's invested capital the Commissioner, instead of giving effect to the cash value of the stocks acquired by Elk Basin on January 1st and on March 15, 1920, considered only what he deemed to be the value of the assets

behind such stocks, and he applied to the tangible property acquired by Elk Basin on the two days in question the limitations on intangible property set forth in subdivision (5), Section 326(a) of the Revenue Act of 1918. An application was made to reopen and reconsider the claim for refund. This was granted but action thereon was deferred by mutual agreement pending final decision of the litigation mentioned above, and after the conclusion of that litigation the claim for refund was reconsidered, and disallowed and rejected in full by the Commissioner on December 13, 1941.

In determining the tax liability of Elk Basin for the calendar year 1920 the amount of its invested capital for that year was the crucial factor and the Court of Claims found that invested capital to be in the amount of $7,926,731.74 including the acquisitions of stock on January 1 and March 15, 1920.

In reaching that decision the Court of Claims ruled that the prices for the Elk Basin stock established by the dealings in that stock on the New York Curb Exchange on the dates in question were not sufficient to substantiate or to justify the finding of a cash value for the Elk Basin stock based on those prevailing prices. Instead the court fixed Elk Basin's invested capital by a reference to the certificate of overassessment which, in turn, considered only the value of the assets underlying the stocks which Elk Basin had acquired on the days in question. Had the market prices of Elk Basin stock been accepted as the criterion for fixing the value of Elk Basin stock, the invested capital of Elk Basin for the calendar year 1920 would have amounted to $11,204,136.88.

Questions Presented

1. Did the Court of Claims err in determining the amount of Elk Basin's invested capital for the calendar year 1920 by reference to the value of the assets underlying the stocks

which it acquired on January 1 and March 15, 1920, rather than by reference to the value of those stocks themselves?

2. Did the Court of Claims err in determining Elk Basin's invested capital for the calendar year 1920 to be only the sum of $7,926,731.74 (Finding No. 19)?

3. Did the Court of Claims err in failing to make any finding as to the market value of Elk Basin stocks on January 1 and March 15, 1920?

4. Did the Court of Claims err in failing and refusing to make the findings of fact requested by the plaintiff to the effect that the cash value of the shares of Elk Basin stock issued by it on January 1, 1920, and on March 15, 1920, were $7.50 and $10⅛ per share, respectively?

5. Did the Court of Claims err in ignoring and refusing to accept as proof of the cash value of the Elk Basin stocks issued by it on January 1 and March 15, 1920, the New York Curb Exchange quotations for those stocks found in Finding No. 14?

6. Did the Court of Claims err in limiting interest on the judgment rendered by it in favor of petitioner to a date not later than 30 days preceding the issuance of the refund check which the plaintiff had rejected?

Reasons Relied On for the Allowance of the Writ

1. The determination of Elk Basin's invested capital by reference to the value of the underlying assets behind the stocks acquired by Elk Basin rather than by reference to the value of those stocks themselves violated Section 326 of the Revenue Act of 1918. While giving lip service to the command of the statute, the Court of Claims in fact and in legal effect considered nothing but the value of the assets

underlying those stocks in determining the additions to Elk Basin's invested capital by reason of its acquisitions on January 1 and March 15, 1920, and in fixing Elk Basin's invested capital at the sum of $7,926,731.74 only. In so doing, the Court of Claims conflicted with its own decision in *United Cigar Stores* v. *United States*, 62 Court of Claims 134. (The writ of certiorari which the government had applied for dismissed on the Solicitor General's confession of error, 275 U. S. 576.) It also conflicted with the decision of the Court of Appeals of the District of Columbia in *Guantanamo Sugar Company* v. *Helvering*, 85 Fed. (2d) 252, and with the decisions of the Board of Tax Appeals (now Tax Court of the United States) in *Regal Shoe Company*, 1 B. T. A. 896, in *Golding Sons Company*, 13 B. T. A. 889, in *Sentinel Publishing Co.*, 8 B. T. A. 325, and in *Merchants National Bank*, 6 B. T. A. 1167.

2. The Court of Claims failed to make any finding as to a material issue in the case, to wit: the market value of Elk Basin shares of stock, although the record is replete with evidence of such value, including admissions made by the Commissioner of Internal Revenue and the defendant's own exhibit. The Court of Claims made an ultimate finding of fact as to the amount of Elk Basin's invested capital but failed to make any finding of fact as to the value of the shares of stock issued by Elk Basin on January 1 and March 15, 1920. The amount of invested capital was dependent on the actual cash value of the stocks of other corporations paid in for Elk Basin stock (Sec. 326(a), Revenue Act of 1918), but a determination of the value of those stocks paid in was impossible unless there was first a determination of the value of Elk Basin's stocks issued in exchange for them, since the value of the stocks acquired is to be determined by the value of the shares issued for them. (*Pierce Oil Corporation* v. *Commissioner*, 32 B. T. A. 403,

430; *Farmers Cotton Oil Company*, 27 B. T. A. 105, 115; *Ambassador Petroleum Company*, 28 B. T. A. 868, 873; *Holmby Corporation* v. *Commissioner*, 28 B. T. A. 1092, 1105; *Seymour Manufacturing Company*, 19 B. T. A. 1280, 1285; *Swiss Oil Corporation* v. *Commissioner*, 32 B. T. A. 777.

3. An ultimate finding of fact of the Court of Claims (Finding No. 19) is not sustained by that court's findings of evidentiary or primary facts (Findings Nos. 14 and 11). Elk Basin's invested capital as found by the court, included the acquisitions of stock on January 1 and March 15, 1920. The amounts at which those acquisitions were included in the invested capital are shown in Finding No. 11. However, Finding No. 14 shows that the value of the stocks issued for those acquisitions (and hence the value of those acquisitions themselves) was considerably in excess of the amount at which they were included in invested capital. This is further proven by Finding No. 11 itself which shows that Grass Creek was included at a valuation of $1,000,000. Since 133,333⅓ shares of Elk Basin were issued for the Grass Creek stock, it is obvious that the Elk Basin shares were valued on that day (January 15) at $7.50 per share, but the Court of Claims failed to value the acquisitions of the Keoughan Hurst shares at that same rate although they were acquired on the same day.

4. In its award of interest, the Court of Claims violated the provisions of Section 177(b) of the Judicial Code which provides that no interest shall be allowed on any claims up to the time of the rendition of judgment by the Court of Claims except that in any judgment of any court for an overpayment in respect of any internal revenue tax, interest shall be allowed upon the amount of the overpayment from the date of the payment thereof to a date preceding the date of the refund check, i. e., the check in payment of

the judgment, by not more than thirty days. The Court was obviously in error in assuming that Section 177(b) of the Judicial Code had been amended by Section 614(a)(2) of the Revenue Act of 1928, as the last named section is not a part of the Judicial Code but is a part of the Internal Revenue Code and deals solely with interest on refunds made by the Commissioner pursuant to statutory authority granted to him.

5. This proceeding raises a question of general importance relating to the interpretation and the administration of the Revenue Laws of the United States. Prior to the present judgment of the Court of Claims the doctrine had been firmly established by the cases cited under the first of these reasons, that it was the value of the stocks paid in to a corporation in exchange for its own shares, rather than the value of the assets underlying those stocks, which was to be considered in determining the corporation's invested capital. The present judgment undermines the rationale of all those decisions. Questions of invested capital are as pertinent under the current Revenue Acts as under the 1918 law, and the doubts raised by this judgment will persist unless and until this court definitely announces the law.

6. This proceeding also raises a question of general importance in the administration of the Revenue Law of the United States, relating to a possible conflict in meaning and application between Section 177(b) Judicial Code (28 U. S. C. A. 284) and Section 3771, Internal Revenue Code. The Court of Claims has patently confused the two sections. This question should be settled by this court.

The Relevant Parts of the Statutes Involved

Revenue Act of 1918

"Sec. 326(a). That as used in this title the term 'invested capital' for any year means (except as provided in subdivisions (b) and (c) of this section):

(1) • • •

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus; Provided • • •

(3) • • •

(4) • • •

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: Provided, that in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but • • •."

"Sec. 325(a). That as used in this title—

• • • • • • •

the term 'tangible property' means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts

receivable, leaseholds and other property other than intangible property."

Judicial Code

"Sec. 284. (Judicial Code, section 177) No interest on claims; exceptions

(a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case, of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is hereby authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor."

Internal Revenue Code

"Sec. 3771. Interest on Overpayments

(a) Rate. Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

(b) Period. Such interest shall be allowed and paid as follows:

(1) Credits. • • •

(2) Refunds. In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon."

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Claims, commanding that Court to certify and send to this Court for its review and determination on a day certain therein to be named, a transcript in accordance with the statute and the rules of this Court of the proceeding in said Court numbered and entitled on its docket "Continental Oil Company, plaintiff, v. United States of America, defendant," No. 45730, and that such judgment of the Court of Claims of the United States may be reviewed by this Honorable Court and that the petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

CONTINENTAL OIL COMPANY,
Petitioner,

By ARTHUR B. HYMAN,
Attorney for Petitioner.